

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ROBIN D. HARTLEY, *et al.*,

Plaintiffs,

v.

BANK OF AMERICA, N.A., *et al.*,

Defendants.

Case No. C16-1640RSL

ORDER GRANTING IN PART  
NWTs' MOTION TO DISMISS

This matter comes before the Court on the "Fed. R. Civ. P. 12(b)(6) Motion of Defendant Northwest Trustee Services, Inc." Dkt. # 16. Plaintiffs filed this lawsuit against a number of lenders, loan servicers, trustees, and other banking institutions alleging technical errors and illegal acts that delayed plaintiffs' ability to modify their home loan and caused damage. Northwest Trustee Services ("NWTs") seeks dismissal of five of the claims asserted, arguing that they are not plausible based on the facts alleged. Having reviewed the complaint, the attached exhibits, and the memoranda submitted by the parties (including plaintiffs' sur-reply), the Court finds as follows:

**BACKGROUND**

In March 2006, plaintiff Robin Hartley executed a promissory note for \$500,800.00, payable to the order of First Magnus Financial Corp. Decl. of Douglas A.

ORDER GRANTING IN PART  
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1 Johns (Dkt. # 9), Ex. 2.<sup>1</sup> The note was secured by a deed of trust on real property located  
2 at 17134 111th Ave. NE, Bothell, Washington. Id., Ex. 3. The deed of trust lists First  
3 Magnus as the lender, Stewart Title as the trustee, and Mortgage Electronic Registration  
4 Systems, Inc. (“MERS”) as both the beneficiary of the trust and the “nominee” for the  
5 lender. Id.

6 Plaintiffs began having trouble making their mortgage payments in 2008. At the  
7 time, Countrywide Home Loans Servicing LP was servicing plaintiffs’ mortgage and  
8 communicated with them regarding amounts past due and its intent to accelerate the loan.  
9 Id., Exs. 4, 5, and 30. On or about April 29, 2009, Robin Hartley and BAC Home Loans  
10 Servicing, LP (identifying itself as the lender) agreed to modify the loan, amending and  
11 supplementing the original note and deed of trust to increase the principal balance to  
12 \$525,243.52 and to reduce the annual interest rate. Robin Hartley signed the Loan  
13 Modification Agreement on May 19, 2009. Id., Ex. 6. The modification was not  
14 countersigned until three years later, by which time BAC Home Loans Servicing, LP had  
15 merged into Bank of America, N.A. Bank of America executed the agreement on  
16 September 10, 2012. Id., Ex. 7.

17 Plaintiffs made their last payment on the loan in July 2009.

18 In April 2012, MERS purportedly assigned its interests as beneficiary of the deed  
19 of trust to Bank of New York Mellon, as trustee for certain certificate holders  
20 (hereinafter, “BNYM”). In January 2013, a law firm acting on behalf of an unidentified  
21 “Deed of Trust Beneficiary” notified plaintiffs that they were in default. The notice  
22 identified BNYM as the owner of the note and Bank of America as the servicer. Plaintiffs  
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24 <sup>1</sup> At some unknown point in time, the note was endorsed over to Countrywide Bank,  
25 N.A., and then to Countrywide Home Loans, Inc. Id.

1 requested mediation, and the matter was referred by the Washington Department of  
2 Commerce. Months passed while Bank of America decided whether or not it wanted to  
3 pursue the notice of default, pursue mediation, and/or offer a loan modification. Id., Ex.  
4 30. Whatever efforts Bank of America was prepared to make were cut off when the  
5 servicing of the loan was transferred to RCS in or before September 2013. Id., Exs. 12,  
6 13, and 30. RCS promptly notified plaintiffs that they were in default and that RCS  
7 intended to accelerate the loan. Id., Ex. 30. The first mediation session was held on March  
8 31, 2014.

9 In July 2014, BNYM appointed Northwest Trustee Services, Inc., (“NWTS”) as  
10 the successor trustee. NWTS issued another Notice of Default, which caused plaintiffs’  
11 counsel to file another request for mediation. Despite the first and second mediation  
12 requests, NWTS took the next step toward foreclosure by issuing a Notice of Trustee’s  
13 Sale on September 4, 2014. Id., Ex. 17. A week later, the mediator notified the parties that  
14 the second referral from the Department of Commerce was in error because the mediation  
15 process was still underway: the second request for mediation was withdrawn (Id., Ex. 30),  
16 and NWTS discontinued the trustee’s sale (Id., Ex. 18).

17 NWTS seeks dismissal of plaintiffs’ claims of quiet title, breach of the covenant of  
18 good faith and fair dealing, negligence, intentional infliction of emotional distress, and  
19 violations of the Washington Lending and Homeownership Act. The question for the  
20 Court in this context is whether the facts alleged in the complaint or shown by the  
21 attached exhibits present a “plausible” ground for relief. Bell Atl. Corp. v. Twombly, 550  
22 U.S. 544, 570 (2007).

23 A claim is facially plausible when the plaintiff pleads factual content that  
24 allows the court to draw the reasonable inference that the defendant is liable  
25 for the misconduct alleged. Plausibility requires pleading facts, as opposed

1 to conclusory allegations or the formulaic recitation of elements of a cause  
2 of action, and must rise above the mere conceivability or possibility of  
3 unlawful conduct that entitles the pleader to relief. Factual allegations must  
4 be enough to raise a right to relief above the speculative level. Where a  
5 complaint pleads facts that are merely consistent with a defendant's  
6 liability, it stops short of the line between possibility and plausibility of  
entitlement to relief. Nor is it enough that the complaint is factually neutral;  
rather, it must be factually suggestive.

7 Somers v. Apple, Inc., 729 F.3d 953, 959-60 (9th Cir. 2013) (internal quotation marks  
8 and citations omitted). All well-pleaded factual allegations are presumed to be true, with  
9 all reasonable inferences drawn in favor of the non-moving party. In re Fitness Holdings  
10 Int'l, Inc., 714 F.3d 1141, 1144-45 (9th Cir. 2013). If the complaint fails to state a  
11 cognizable legal theory or fails to provide sufficient facts to support a claim, dismissal is  
12 appropriate. Shroyer v. New Cingular Wireless Servs., Inc., 622 F.3d 1035, 1041 (9th Cir.  
13 2010).

#### 14 **A. QUIET TITLE**

15 Plaintiffs allege that any action to foreclose their deed of trust is barred by the  
16 applicable statute of limitations and that they are therefore entitled to quiet title under  
17 RCW 7.28.300. Dkt. # 1 at ¶ 111. NWTS has no ownership or possessory interest in the  
18 property, however, nor does it claim such an interest. It is therefore not a proper  
19 defendant to a quiet title action. See Kobza v. Tripp, 105 Wn. App. 90, 95 (2001).  
20 Plaintiffs acknowledge that their quiet title claim against NWTS fails as a matter of law,  
21 but argue that NWTS should remain a defendant on this claim – even though there can be  
22 no liability – so that it can provide information regarding the amount of the debt that is no  
23 longer enforceable. Complete relief on the claim can be had without NWTS'  
24 involvement, however. Nor is the potential need for discovery a justification for asserting  
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1 a meritless claim against a particular defendant. Even if all claims against NWTs are  
 2 dismissed, plaintiffs may seek information from NWTs under Rule 45.

3 **B. WASHINGTON MORTGAGE LENDING AND HOMEOWNERSHIP ACT, RCW 19.144.005**  
 4 ***ET SEQ.***

5 Plaintiffs allege that NWTs violated the Mortgage Lending and Homeownership  
 6 Act (“MLHA”) by making misstatements, misrepresentations, or omissions regarding the  
 7 outstanding loan balance and terms based on an improper loan modification.<sup>2</sup> The MLHA  
 8 does not provide for a private right of action, however. RCW 19.144.120 (“The director  
 9 or the director’s designee may, at his or her discretion, take such actions as provided [in  
 10 various titles and chapters] to enforce, investigate, or examine persons covered by this  
 11 chapter.”); Hummel v. Nw. Trustee Serv., Inc., 180 F. Supp.3d 798, 805 (W.D. Wash.  
 12 2016).

13 Despite acknowledging that they are not the correct parties to pursue a claim under  
 14 the MLHA, plaintiffs request that NWTs’ motion be denied and that the Court compel  
 15 the Director of the Department of Financial Institutions to pursue the claim (or to  
 16 determine whether plaintiffs should be deputized to pursue it on behalf of the Director).  
 17 Plaintiffs cite to Rule 21 as support for this extraordinary application, but this is not a  
 18 matter of misjoinder or nonjoinder. Plaintiffs do not have standing to assert the claim in  
 19 the first instance. The government’s participation is not, therefore, necessary to the grant  
 20 of complete relief as to any claim that plaintiffs can pursue. Plaintiffs simply have no  
 21 claim under the MLHA. They may bring the facts of their case to the Director in the

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22 <sup>2</sup> Plaintiffs also allege that “defendants” violated the MLHA “by transferring servicing  
 23 rights to RCS while informing the borrowers that the BANA defendants were proceeding with  
 24 the Foreclosure Mediation.” Dkt. # 1 at ¶ 136. NWTs was not involved with the loan at the time  
 25 the servicing functions were transferred, and plaintiffs offer no theory under which NWTs could  
 be held liable for the actions of others in this context.

1 hopes that she will pursue an MLHA claim against NWTS, but they may not initiate  
2 and/or pursue a claim that belongs to someone else.

3 **C. BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

4 Plaintiffs have not asserted a breach of the covenant of good faith and fair dealing  
5 claim against NWTS and/or have not opposed its dismissal.

6 **D. NEGLIGENCE**

7 Plaintiffs' negligence claim is based in part on an alleged "general duty of care to  
8 Plaintiffs in servicing their loan in such a way as to prevent foreclosure and prevent  
9 emotional distress." Dkt. # 1 at ¶ 169. There is no such duty under Washington law.  
10 NWTS was bound to exercise its powers as trustee pursuant to the grant of authority from  
11 the beneficiary and the governing statutes. To impose upon a trustee an obligation to  
12 enforce the deed of trust in a way that prevents default/foreclosure and the emotional  
13 distress that arises therefrom would give plaintiffs a benefit not specified in their bargain  
14 and would likely put the trustee in breach of its contractual and statutory obligations to  
15 the beneficiary. Plaintiffs have not identified, and the Court has not found, any  
16 Washington authority that supports the proposition that a trustee has a general duty to  
17 prevent foreclosure and emotional distress.

18 Plaintiffs also allege that NWTS failed to comply with applicable state and federal  
19 laws regarding mortgage foreclosure proceedings. Dkt. # 1 at ¶ 170. The "existence of a  
20 duty may be predicated upon statutory provisions or on common law principles" (Degel  
21 v. Majestic Mobile Manor, Inc., 129 Wn.2d 43, 49 (1996)), and plaintiffs have asserted  
22 statutory violations against NWTS. See Dkt. # 1 at ¶¶ 134-38 (MLHA claim) and ¶ 162  
23 (Washington Consumer Protection Act claim and Deed of Trust Act violation). In this  
24 respect, plaintiffs' negligence claim is based on duties established by statute that are  
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1 separate and distinct from any contractual obligations NWTS may have had. If the jury  
2 finds that NWTS breached those duties, it would be permitted to “weigh the statutory  
3 violation(s), along with other relevant factors, in reaching its ultimate determination of  
4 liability” on the negligence claim. Doss v. ITT Rayonier, Inc., 60 Wn. App. 125, 129  
5 (1991).<sup>3</sup>

6 **E. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

7 Plaintiffs have not asserted an outrage claim against NWTS and/or have not  
8 opposed its dismissal.

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10 For all of the foregoing reasons, NWTS’ motion to dismiss (Dkt. # 16) is  
11 GRANTED in part and DENIED in part. Plaintiffs’ quiet title, MLHA, good faith and fair  
12 dealing, and emotional distress claims are DISMISSED as to this defendant. Plaintiffs’  
13 negligence claim may proceed.

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15 Dated this 25th day of January, 2017.

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18 Robert S. Lasnik  
19 United States District Judge  
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24 <sup>3</sup> The Court has not considered NWTS’ arguments, raised for the first time in reply,  
25 regarding the issues of causation and damages.